below and the petition for certiorari (pet. 8) incorrectly point out an alleged distinction, charging that Wyoming Associated was not a direct lessee from the State, but "had direct contractual relations only with the private lessee of the state lands," thus invoking the rule of cases of the *Wanless* type.[1] The majority opinion of the court below more accurately states:

> "In the case at bar we find the lessee and the taxpayer bound together by a trust agreement entered into before the lease by the state was made by which they were to have equal rights in the lease * * *."

The stipulation of facts (R., 70, Pars. 5(c), 6 and 7, R., 71, Pars. 8 and 11, R., 74, Par. 27, R., 77, Par. 36) in much greater detail shows that the interest of Wyoming Associated in the State lease was not derived from the nominal lessee, Midwest Oil Company, but may be traced back to a segregated fractional interest in the original State lease of 1910, of which the State lease involved herein was the fourth renewal. The declaration of trust executed by Midwest Oil Company on February 1, 1923 (R., 146), upon which petitioner relies in urging a distinction between this and the *Coronado* case, was not the assignment or creation of a subinterest in that lease, but was the explicit recognition of a continuing ownership by Wyoming Associated and its predecessors of an equitable interest in the original lease and in all its renewals and extensions.

It is a common occurrence, as here, for a lease to be taken in the name of the common agent of a partnership or a corporate group. The real and direct character of the title accruing to each beneficiary of such a resulting trust is recognized for all tax purposes. As a matter of fact, any corporation in acquiring a lease would have had to act through others, i. e., through its officers or through other agents.

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[1] *Wanless Iron Co.* v. *Commissioner*, 75 F. (2d) 779 (C. C. A. 8th, 1935), cert. den. 295 U. S. 765, in which tax exemption is denied with respect to income received by the assignee of a lease from its sublessees. This was held too remote from the State.

That Wyoming Associated acted through another corporation as its agent, rather than through its own officers, would be tenuous ground for denying the application of the *Coronado* case. The declaration of trust referred to bears a date earlier than the particular lease involved in this case. From these title facts (peculiar to this case and of little general significance in the development of any rule of law) the lower court finds:

> "* * * In substance and effect the Wyoming Associated was as much a lessee of the lands as was the Midwest Oil Company, the lessee in name."

There is thus no valid ground for denying the applicability of the *Coronado* case. We are here dealing with the status of a true original party to the lease, and it is an immaterial circumstance that such party was represented in the contractual negotiations with the State by a trustee or agent. The revenue acts uniformly look to the substance of the transaction rather than to technical matters of form in determining the identity of the recipient of income or the identity of the person entitled to claim deduction or exemption. Cases of the type of the *Wanless* case, on the other hand, illustrate a different principle.

The position of the taxpayer in the *Wanless* case was that of assignee of a lease from the State of Minnesota originally granted to Wanless individually. The taxpayer, Wanless Iron Company, in turn had subleased to three other parties and received an intermediate royalty, not from the State of Minnesota, but from these sublessees. The opinion of the Eighth Circuit Court of Appeals points out that the operations were not carried on under the State lease, but under subleases between the taxpayer-assignee and its sublessees. The net income of the taxpayer, therefore, arose from operations in a private capacity for private gain. These were held to be too remote to merit tax exemption. In the instant case no such remoteness exists. The Wyoming Associated did pay royalty to the State of Wyoming. It

made delivery to the State of royalty oil in kind. It sold its fraction of the oil remaining direct to The Midwest Refining Company. It collected its part of the proceeds without any intervention of the Midwest Oil Company with respect thereto (R., 78-79). The arrangement between the Midwest Oil Company and Wyoming Associated constituted a dry, passive trust, not an assignment under which the assignee received income from its sublessees. The Midwest Oil Company retained no intermediate royalty, as did the Wanless Iron Company (R., 79).

Petitioner also bases his request for certiorari of the tax exemption question upon an allegation of "substantial conflict"[1] between the decision of the Tenth Circuit Court of Appeals in the instant case, and the decision of the Ninth Circuit Court of Appeals in the *Bankline* case, which latter case follows the decision of this Court in the *Jergins* case. No such conflict exists.

The *Bankline* case turned on the valid distinction, which has for the past five years been recognized by this Court, between (1) income from a State lease covering "school lands" where the land was granted by the United States to the State at the time of its admittance into the Union and the land is held by the State under this express trust for the benefit of common schools (*Burnet* v. *Coronado Oil & Gas Co., supra*), and (2) income from a municipal lease covering land thus in substance owned by the State, *but not*, as far as its oil content or its value is concerned, *devoted to any specific sovereign trust.* (*Burnet* v. *A. T. Jergins Trust, supra*). Even the Commissioner in his memorandum reply to the petition for certiorari in the *Bankline* case says (at p. 2):

> "* * * It is probable that the decision in this case (*Bankline*) can be reconciled with the *Mountain Producers* case on the ground suggested in the *A. T. Jergins* case, where the Court distinguished the *Gillespie* and *Coronado* cases on the ground that the

[1] In his memorandum on petition in *Bankline Oil Co.* v. *Commissioner* (90 F. (2d) 899 (C. C. A. 9th, 1937)), No. 388 in the Supreme Court on certiorari, the Solicitor General used, in addition to the expression "substantial conflict", the expression "apparent conflict" (p. 3).

> government lands were in those cases held pursuant to an express trust (p. 516). In the present case, the lands are tide lands owned by the State of California in its sovereign capacity and its trusteeship is implied rather than expressed. In the *Mountain Producers* case the State of Wyoming leased lands granted by the United States to the State for the maintenance of its schools. It is possible that the title of the State of Wyoming may be more akin to that of an express trustee than is that of the State of California in the present case. But we do not believe that this distinction can properly be given controlling weight; * * *"

But this distinction was given controlling weight by this Court in the *Jergins* case. The point is settled.

Whether the facts in the *Bankline* case classify it with the *Jergins* case or with the *Coronado* case, it seems clear that it can present no conflict with the decision of the instant case in the court below. The decision below turns on a point not involved in the *Bankline* case, i. e., the special situation presented by the status of the Wyoming Associated under the declaration of trust, and this point is of no general significance to taxpayers.

Issue 2.

THE COURT BELOW DID NOT ERR IN HOLDING THAT THE GROSS INCOME OF WYOMING ASSOCIATED, FOR THE COMPUTATION OF PERCENTAGE DEPLETION, SHOULD INCLUDE NOT ONLY THE CASH RECEIVED FOR THE OIL SOLD BUT ALSO THE VALUE OF THE PRODUCTION AND OTHER SERVICES PERFORMED BY THE PURCHASER PURSUANT TO THE PURCHASE AGREEMENT; NOR DOES THE DECISION OF THE COURT BELOW ON THIS POINT CONFLICT WITH ANY OTHER DECISION.

The Solicitor General claims that the decision of the court below on the percentage depletion point is in conflict with the decision in *Signal Gasoline Corp.* v. *Commissioner,* 66 F. (2d) 886 (C. C. A. 9th, 1933), and *Bankline Oil Co.*

v. *Comm., supra.* These cases decided that a purchaser of wet gas might, under certain circumstances, have a depletable interest in part of the mineral produced. This would mean, according to the Solicitor General, that the purchaser in the instant case would be entitled to depletion all of which, according to the Solicitor General, has been allowed to Wyoming Associated.

The petition for certiorari (p. 10) on this point says:

> "* * * the decision of the court below gives the entire allowance to respondent, the vendor, and in effect excludes the purchaser from any possible depletion allowance, and the decision, therefore, presents a conflict in principle with the decisions of the Circuit Court of Appeals for the Ninth Circuit in the *Signal* case *supra*, * * * and in *Bankline Oil Co.* v. *Commissioner*, * * *."

Since no one but the Wyoming Associated owned any interest in the oil (*Thomas* v. *Perkins*, 57 S. Ct. 911), it might well be argued that the "entire allowance" of depletion should be given to respondent,[1] as the Solicitor General says has been done. However, it is unnecessary to discuss this problem because the conflict alleged between the *Signal* and *Bankline* cases on the one hand, and the instant case on the other hand, depends upon the correctness of the Solicitor General's statement that the decision of the court below does give the entire depletion allowance to respondent. If it does not do so, there is admittedly no conflict.

If the entire depletion allowance were given to respondent, the gross income of the respondent for percentage depletion purposes would be the market price of oil times barrels produced. Under the decision of the court below the respondent does not get the benefit of depletion on any such basis. The decision of the court below simply permits

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[1] The Record shows that title to oil in the instant case passed from Wyoming Associated to The Midwest Refining Company, after it had been severed from the land "at the outlet gates of the measuring tanks located" on the leases (R., 151).

the inclusion in gross income, for percentage depletion purposes, of the cash contract price of oil plus the value of the services rendered pursuant to the contract "as part of the price for oil purchased" (R. 45, 150-1). The total gross income computed under the lower court's decision amounts to $7,423,055.74 (the cash contract price of $4,606,535.70 plus a value of services proved by production cost of $2,816,520.04; R. 189), whereas the total gross income calculated with reference to the market price of oil would be $8,411,450.19 (a production in the year of 4,650,794.50 barrels times the stipulated average field price of $1.808605 per barrel; R. 189, 77). The difference of $988,394.45 is available as a basis for depletion to the purchaser if the purchaser should be held entitled thereto. Therefore, the Solicitor General's contention that this case conflicts with the *Signal* and *Bankline* cases falls,—falls because it is founded on an incorrect understanding of the effect of the lower court's decision.[1]

There is no conflict between the *Signal* and *Bankline* cases on the one hand, and the instant case on the other hand, for the reason that the former two cases, as decided by the Ninth Circuit Court of Appeals, contemplate the calculation of depletion on exactly the same basis as has been sanctioned by the Tenth Circuit Court of Appeals in the instant case (p. 904). The opinion of the court in the

[1] The Solicitor General is, perhaps, misled by the fact that before the Board of Tax Appeals respondent, at that time petitioner, claimed, alternatively, depletion on the market value of the oil. This was done on the theory that the difference between the cash contract price of the oil and the market value of the oil afforded a yardstick to measure the value of the services or, in other words, that the total market price would be one way of showing the total price, i. e., cash plus the value of the services. If the taxpayer had stood upon this position before the Circuit Court of Appeals and had been sustained by that court, there would be some ground for the Solicitor General's statement that the Circuit Court of Appeals decision left no possibility of any depletable interest in the purchaser and was, therefore, in conflict with the *Bankline* and *Signal* cases. But the taxpayer, when it came before the Circuit Court of Appeals, elected to rely upon the cost to the purchaser of performing its services as a sounder measure of value, hence, instead of claiming depletion based on the market price of the oil, the taxpayer asked and was granted depletion only on a lesser sum made up of the contract price of the oil plus the value of the productive services rendered by the purchaser as proved by the stipulated cost thereof.

Bankline case, reiterating its decision in the *Signal* case, states that it there held that, for the purpose of determining the depletion allowance, the gross income from the property of a manufacturer who produced gasoline from wet gas was "the difference between the market value of the wet gas delivered to it less *the amount the manufacturer had agreed to pay for it*" (italics supplied).

The italicized phrase appropriately applies to a payment in services as well as to payments exclusively in cash. From the viewpoint of the seller, the *Signal* case is clearly consistent with an allowance to the seller of percentage depletion based upon gross income consisting of *whatever amount the manufacturer had agreed to pay,* including any payment in services. From the viewpoint of the purchasers, there is left to the purchasers in the *Signal* and *Bankline* cases depletion based upon gross income consisting of the difference between the market value of the wet gas and the amount which the lease owner received therefor, including the value of services received in kind.

All that was done by the court below in this case was to compute the "amount the manufacturer had agreed to pay" by including a payment in services. There is no inconsistency here with the *Signal* and *Bankline* cases since the contracts presented in these cases did not call for any such payment but merely for a cash payment. Certainly these cases did not preclude the inclusion in such amount of a payment in services; so far as they go, these cases are consistent with the instant case, although they do not pass specifically upon the basic question presented by the instant case.

The Solicitor General also asserts that "The production expense of the purchaser was not gross income of the seller," under any "definition of gross income."

Why cannot the value of services performed by one party to a contract constitute income to the other party for whom they are performed? For example, A performs services for B worth $100, in return for stock which cost

B nothing. The $100 is part of B's gross income. (Cf. *Heiner* v. *Crosby*, 24 F. (2d) 191 (C. C. A. 3rd, 1928).) In the instant case Wyoming Associated sold oil for cash plus performance by the purchaser of certain services "as part of the price for oil purchased" (R. 45, 150-1). Suppose that Wyoming Associated had sold its oil as produced from this particular set of wells, not for cash, but simply in return for performance on the part of The Midwest Refining Company, for the benefit of Wyoming Associated, of all the producing services utilized in producing oil from *another* set of wells. In that case, it could not be contended that the value of these services did not constitute gross income from the first set of wells. What difference does it make whether the services be performed with respect to the first set of wells or with respect to another set of wells, so long as the services have a definite money and economic value to Wyoming Associated? Suppose, further, that after Wyoming Associated had made an agreement, such as we postulate, that agreement had been modified to provide for a cash payment for the oil from the first set of wells, in addition to the continued performance of the aforementioned services. Certainly the *additional cash consideration* would not affect the result; the value of the services, specified by the contract as part payment for the oil, would continue to be part of the income of Wyoming Associated. It follows that since the agreement as *originally* made provided for a cash payment for the oil plus the performance of certain services as part of the purchase price, the value of these services is as much a part of the income of Wyoming Associated as the cash received.

This common sense analysis of the whole matter cannot be countered by saying, as the Solicitor General does at the bottom of page 11 of his petition for certiorari, that the value of the services was not part of the price or consideration for the oil but was a consideration for an agreement to sell the oil at less than market price. Why carve the contract up in this artificial way? Indeed, the very

statement of such an analysis is its own refutation; if the seller agreed to perform services in order to get oil at a lower price, the value of those services is obviously part of the total price paid for the oil.

The Solicitor General goes on to point out that the amount representing the value of the services was never physically received by the Wyoming Associated and was never entered in its books or in the respondent's books or in the income tax return as gross income.

The taxpayer is not estopped by this circumstance. *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481. If Wyoming Associated had gone through the form of including the value of the services in its taxable gross income, it would have been entitled to take the same item as an expense incurred on its behalf. Therefore, the inclusion of the item in gross income, later to be deducted as an expense, would have been a mere idle gesture on the part of the taxpayer, the omission of which in no wise prejudiced the Commissioner.

The lower court's decision with respect to percentage depletion does not call for review by this Court. The basic principle on which this point was decided by the court below is irrefutable, viz., that the value of services in a given case may constitute gross income. The case given here is one where the value of the services was by the very terms of the contract made a "part of the price for oil purchased." Because of the special nature of the contract, and the language employed, it is more than doubtful whether any other case like this exists. In any event, granting the fundamental principle that the value of services *may* constitute income, it is obvious that whether services do constitute income in any particular case depends on the special factual circumstances involved. The matter is really not one of general law but of contractual interpretation and not a matter of widespread importance to be passed upon by this Court.

Conclusion.

Wherefore, it is respectfully submitted that the petition for certiorari herein should be denied.

Respectfully submitted,

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APPENDIX.

Revenue Act of 1926, c. 27, 44 Stat. 9:

Sec. 204. * * *

(c) The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in subdivision (a) or (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property, except that—

* * * * * *

(2) In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph.

Sec. 213. For the purposes of this title, except as otherwise provided in section 233—

(a) The term "gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source what-

ever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period.

Sec. 234. (a) In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * * *

(8) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee;

* * * * * *

Treasury Regulations 69, promulgated under the Revenue Act of 1926:

Art. 221. *Depletion in the case of oil and gas wells.*—Under section 204 (c) (2), in the case of oil and gas wells, a taxpayer may deduct for depletion an amount equal to 27½ per cent of the gross income from the property during the taxable year, but such deduction shall not exceed 50 per cent of the net income of the taxpayer (computed without allowance for depletion) from the property. In no case shall the deduction computed under this paragraph be less than it would be if computed upon the basis of the cost of the property or its value at the basic date, as the case may be. In general, "the property," as the term is used in section 204 (c) (2) and this article, refers to the separate tracts or leases of the taxpayer.

Sec. 6, Article VII, Constitution of the State of Wyoming, accepting United States land grant.